even if they were from the windscreen of the car, all to the side of the lorry would not be a strange phenomenon. It would certainly not be something which would be inherently improbable.

The lorry driver did not say in his report to the police that the car had encroached on to his side of the road. His explanation for not doing that was that his report that the car knocked into his lorry meant that the car had encroached into his path. The driver of the car also made a report at about 9.30 p.m. on the date of the accident. In his report he clearly stated that the lorry had encroached on to his side of the road. In the circumstances the learned judge ought not to have accepted the explanation of the lorry driver as to why he had not specifically mentioned in his report that the car encroached on to his side.

It appeared to us from the learned judge's grounds of judgment that in arriving at his decision he did not consider the damage to both the vehicles. The damage was to the front offside of each vehicle. It was in evidence that the road at the place of the accident was rather narrow. Neither of the vehicles had gone off the road before the impact. The evidence before the learned judge was therefore clearly indicative of the fact that the accident took place at or very near the middle of the road.

Counsel for the respondents submitted to us that the learned judge had made a finding of fact after hearing the two versions of the accident, and that he had chosen to accept the evidence of the lorry driver. He also submitted that the pieces of glass and the scratch mark were on the lorry side of the road. As we have already said, neither the position of the scratch mark on the road nor the place at which the broken pieces of glass were found gave clear indication as to the point of impact. Moreover, the learned judge's finding was clearly not based entirely on the demeanour of the witnesses as they gave evidence. Therefore, to use the words of Thomson C.J. (as he then was) in *Foong Yit Voon* v. *Yap Thian & Anor.*,[1] in all the circumstances of the case we thought that we were in as good a position, or as bad a position, as the trial judge to form a view as to what happened.

It was stated by Lord Edmund-Davis in delivering the judgment of their Lordships of the Privy Council in *Yahaya Mohamad* v. *Chin Tuan Nam*[2] that the percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral testimony must be very small. In this case, however, the oral testimony of the two witnesses was well-balanced. If anything, the evidence of the driver of the car was consistent with what he stated in his report to the police about the accident. The learned trial judge clearly did not decide the case wholly on the oral testimony of the witnesses. In our judgment nothing very much turned on the evidence as regards the mark on the road or the pieces of glass on the grass verge on the lorry side of the road. The balance of probability therefore was in favour of the view that the drivers of both vehicles were to blame and that it was impossible to say in what proportion the blame should be allocated between them.

One of the grounds of appeal on behalf of the appellants in this case was that the learned trial judge ought to have held that in the absence of cogent and reliable evidence on which he could come to a definite finding it would not be unreasonable to apportion the liability equally between the drivers of the two vehicles. We found ourselves in full agreement with that ground of appeal. We therefore allowed the appeal, setting aside the judgment of the court below and substituting in its place an order that the liability for the accident be apportioned equally between the two drivers. The learned judge assessed general damages on the basis of full liability at $42,628 and special damages were agreed at $1,515. We therefore gave judgment for the plaintiffs for half of those amounts together with interest as claimed and costs.

Appeal allowed.

Solicitors: *Foo & Woon; Chor Pee & Hin Hiong.*

RE CHOE KUAN HIM, ADVOCATE & SOLICITOR; T. DAMODARAN v. CHOE KUAN HIM

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) August 20, 1976]

[Alor Star — Federal Court Civil Appeal No. 111 of 1975]

Legal Profession — Solicitor — Undertaking — Undertaking to pay balance of purchase money to vendors on registration of transfer of land — Lis pendens order registered against land — Solicitor offering to pay money to court.

In this case the respondent, an advocate and solicitor, was acting for both the purchasers and the vendors of a piece of land. He gave an undertaking to confirm that the balance of the purchase money had been deposited with them and that this would be paid to the vendors upon the transfer of the land being registered. The transfer was duly registered but in the meantime a *lis pendens* had been obtained and registered against the land. The respondent indicated that he would pay the money into court but the appellant, the vendor, applied for the payment of the money to him. The learned trial judge ordered that the money be paid into court but also ordered that the respondent should pay costs and interest at the rate of 12% per annum ([1975] 2 M.L.J. 274). The appellant appealed to the Federal Court and the respondent cross-appealed against the order for payment of costs and interest.

Held, (Suffian L.P. and Wan Suleiman F.J., Ali F.J. dissenting): (1) in the peculiar circumstances of this case the respondent should be allowed to release the money into court and not to the vendor — appellant;

(2) that in the circumstances costs in the court below and on appeal should be borne by the appellants and the respondent should only be ordered to pay interest at 6% per annum from the date of judgment.

Case referred to:-

Re a Solicitor, Ex parte Hales [1907] 2 K.B. 539.

The following authorities were also cited in argument: *In re H.A. Grey* [1892] 2 Q.B. 440, p. 443 4th line, p. 444, para. 2; *United Mining & Finance Corporation Ltd.* v. *Becher* [1910] 2 K.B. 296, 299, 300, 304; *Re a Solicitor* [1966] 3 All E.R. 52, 55; *Seah Choon Chye* v. *Saraswathy Devi* [1971] 1 M.L.J. 112; *Bank of Athens Societe Anonyme* v. *Royal Exchange Assurance* [1938] 1 K.B. 771; *Ballemy* v. *Sabine* (1857) 1 De G. & J. 797; 43 English & Empire Digest 1964 edition, p. 362, para. 3826.

FEDERAL COURT.

Wong Chong Wah for the appellant.

A. Jayadeva for the respondent.

Suffian L.P.: The applicant (appellant before us) had some lands in the mukim of Sungai Pasir, in Sungai Patani, Kedah, totalling just over 40 relongs in area. By agreement dated August 2, 1973 (exhibit C6), he agreed to sell and Andavan agreed to buy it for $369,768. By clause 3 it was provided that the property sold was "to be free from all incumbrances whatsoever". Andavan paid a deposit of $36,976.

On August 21, 1973, one Vesudevan entered a private caveat against the lands and on December 19, 1973, he issued a writ in the Alor Star High Court against the applicant (Civil Suit No. 256 of 1973) claiming that the applicant held half the lands as trustee for him and that the applicant had agreed to sell the lands to Andavan without his consent. The applicant successfully applied to have the caveat removed. Vesudevan again caveated the lands. This time the applicant not only successfully applied to have the caveat set aside but also obtained an injunction restraining Vesudevan from again caveating the lands.

On December 20, 1973, Vesudevan obtained an order from the Alor Star High Court that the right in the disputed land was in question and that that order remain in force as a *lis pendens* for 12 months or until the determination of the suit, whichever was the earlier, and on December 22, 1973, the *lis pendens* order was registered by the Land Office. That order was obtained *ex parte* and on February 9, 1974, the applicant applied to have it set aside. On April 27, the judge dismissed this application, thus confirming the *lis pendens* order. The applicant appealed to the Federal Court.

All the while the sale agreement between the applicant and Andavan had not been completed and the lands still remained registered in the name of the applicant.

On March 6, 1974 (*i.e.* while there was a *lis pendens* order against the lands) Andavan assigned the sale agreement to the Syarikat Alor Merah Sdn. Bhd. by assignment (exhibit C7). This document was signed by the applicant, by Andavan and the company. Mr. Choe Kuan Him, solicitor (respondent in the lower court and also here), acted for both the applicant and the company. At the same time the applicant received from Mr. Choe a written undertaking dated the same day (March 6, 1973) as follows:

"This is to confirm that the sum of ringgit three hundred and thirty two thousand seven hundred and ninety two ($332,792) being the balance of the purchase price of (the lands in question) has been deposited with us and that the said sum will be released to you (applicant) upon the transfer of (the lands) being duly registered in the name of the purchasers Messrs. Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns."

The transfers of the lands into the names of the nominees of Alor Merah Sdn. Bhd. were duly registered on April 16, 1974.

Out of the money held by him, Mr. Choe paid $150,000 to the chargor of the lands. He also gave a cheque dated April 23, 1974, for the balance to the applicant, but subsequently Mr. Choe stopped payment of this cheque, because (as already stated) on April 27, 1974, the judge had confirmed the *lis pendens* order against these lands and there would have been difficulty about the applicant transferring the lands free from incumbrances.

The applicant who had been represented by Mr. Choe at the time of the assignment switched lawyers and now retained Messrs. Skrine & Co. who by letter dated April 30, 1974, wrote to Mr. Choe demanding payment of the money, as follows:

"We act for (the applicant) and are instructed to refer to your written undertaking to him of March 6, 1974.

This undertaking states that the balance of the purchase price of the lands totalling $332,792 has been deposited with you.

The undertaking undertakes to release this sum to our client on the transfer being registered.

Our instructions are that the transfer has been registered and that you have refused to pay our client. This is a clear breach of the undertaking given.

We are instructed to request you to make the payment to our client within forty-eight (48) hours from the receipt of this letter failing which our instructions are to issue a Specially Indorsed Writ and to seek summary judgment against you in the High Court and to report the matter to the Bar Committee as a breach of your undertaking."

By letter dated May 4, 1974, Mr. Choe wrote to Skrine & Co. explaining why he stopped payment of the cheque, as follows:

"Our letter of March 6, 1974 was given on the understanding that your client (the applicant) will comply with all the terms of the Sales Agreement which he entered into with one Andavan s/o Ayapen in respect of the sale of the said lands which said Sales Agreement was assigned to our clients on March 6, 1974.

One of the terms of the said Sales Agreement is that the said lands shall be free from all encumbrances whatsoever. You are no doubt aware that a *lis pendens* is presently registered against the said lands and that your application to remove the same was we understand dismissed on April 27.

In any event in accordance with our undertaking and on your clients assurance that the *lis pendens* will be removed on April 27 we paid your client on April 23, the balance of the purchase price vide our U.M.B.C. cheques No. 049350 and 038801.

When the said *lis pendens* was not removed by April 27 we were instructed to and stopped payment on cheque No. 038801."

On May 7, 1974, Skrine & Co. wrote to Mr. Choe reiterating their stand that Mr. Choe should pay over the money to the applicant now that the lands have been transferred to the assignee's nominees.

To return to the *lis pendens* order registered against the land at the instance of Vesudevan, on May 8, 1974, the *lis pendens* order was re-registered by the Land Office against these lands and on May 16, 1974, the applicant filed notice appealing to the Federal Court against the *lis pendens* order.

By originating summons dated July 30, 1974, the applicant applied for an order that Mr. Choe pay him the money forthwith in accordance with his personal undertaking.

Mr. Choe was willing to release the money, but not to the applicant. He said that he should pay it

into court in view of the complication caused by the registration of the *lis pendens* order against these lands, the first time a *lis pendens* order has ever been registered in a Malay state. Mr. Jayadeva argued on his behalf that the undertaking had been given by mistake in too wide terms, that it must be read together with the agreement of sale and the assignment, that the assignment referred to the agreement of sale, that by the agreement of sale the applicant expressly agreed that the lands were to be sold free from all incumbrances, that the *lis pendens* order against the lands made the title imperfect, that Mr. Choe as a stakeholder undertook to release the money not just on the registration of the transfers in favour of United Realty but only if the titles so transferred were perfect in every way, and certainly not incumbered by a *lis pendens* order.

The applicant's application was considered in chambers on October 5, 1974, and on December 7, 1974, it was allowed. It was adjourned for further arguments in open court which were heard on March 9, 1975, when the learned judge reserved judgment.

On July 12, 1975, the Federal Court gave judgment in the appeal by the applicant in Civil Suit No. 256 of 1973 affirming the *lis pendens* order granted against these lands, see [1975] 2 M.L.J. 231.

Two days later the learned judge decided on the application of this applicant, but instead of ordering the money held by Mr. Choe to be paid to the applicant he ordered that it be paid into court, in view of the dispute caused by the *lis pendens* order.

The applicant appeals against that part of the judgment that ordered that the money be paid into court. He says that it should be paid to him.

Mr. Choe himself cross-appeals against that part of the judgment that ordered that (a) he pay costs and (b) that he pay interest at 12% per annum on the money from April 16, 1974 (the date of the registration of these lands in favour of United Realty) until date of payment. Mr. Jayadeva on his behalf argues that as he was willing to pay the money into court and the court so ordered he had won and should not therefore have to pay costs. As to interest, if at all he should pay only the usual rate (6% per annum) and not from April 16, 1974, but from the date of judgment.

The law and practice relating to solicitors' undertakings in Malaya in my opinion is the same as that in England.

Mr. Choe is an officer of the court and we should compel him to honour undertakings by him promptly to secure public trust and confidence in the legal profession which is an ancient and honourable one, and the language used by Mr. Choe in this undertaking is clear, unambiguous and unqualified and that any one reading it cannot but get the impression that Mr. Choe undertook to release the money in his hand the moment the lands had been transferred into the name of the Alor Merah Sdn. Bhd. or its assignees. But I respectfully agree with the learned judge in the court below that in the peculiar circumstances of this case Mr. Choe should be allowed to release it into court, as he requests, and not to the vendor-applicant.

I agree with Mr. Jayadeva for Mr. Choe that the undertaking should be considered not in isolation, but in the light of the sale agreement and the assignment. At the time of the undertaking (on March 6, 1974) the applicant was not a stranger to Mr. Choe but on the contrary he was Mr. Choe's client, the applicant had by the sale agreement of August 2, 1973, sold the lands promising to give a good title free of all incumbrances, to the purchaser Andavan or his assignees, the applicant knew that there would have been some difficulty about him giving an unincumbered title because nearly three months before, on December 19, 1973, Vesudevan had brought a suit against him claiming a half share in the lands, which suit was followed by litigation concerning the caveat and *lis pendens* order already referred to. If Vesudevan's claim is dismissed, well and good. But what if it is not? In that event, the purchaser's assignees will not have obtained an unincumbered title as promised by the vendor-applicant, and it is certain that there will be a claim by the purchaser's assignees against the applicant, as well probably as one against Mr. Choe. Would this be fair to Mr. Choe? I think not.

Did Mr. Choe when he gave the undertaking know of the incumbrance or the applicant's title? Probably so, because in his own letter of May 4, 1974, to Skrine & Co. on behalf of the applicant he referred to it. That being so, he could very well have so worded his undertaking as to make it quite clear that he would release the money in his hand not only when a transfer had been registered in favour of the purchaser or his assignees but also after the *lis pendens* order has been removed. That he did not do so does not in my opinion matter in the peculiar circumstances of this case. By mistake Mr. Choe had expressed his undertaking in terms too wide, and the applicant knew or should have known this, and the court should not allow him to take advantage of Mr. Choe's mistake.

In the event I would dismiss this appeal so that the order of the lower court that Mr. Choe pay this money into court stand. As regards interest, I agree that Mr. Choe should pay only the usual rate, namely 6% per annum; no case for changing the usual rate has been made out. Interest should in my judgment be paid from the date of judgment of the High Court, not from April 16, 1974, when the transfers in favour of Andavan's assignee were registered. The applicant wanted the money for himself, Mr. Choe on the other hand wanted to pay into court. Until the application had been decided by the lower court, Mr. Choe was not sure to whom he should pay. He should pay interest only from the date when he was sure. That part of the judgment appealed from dealing with interest is accordingly amended.

As regards costs, the applicant should pay the costs of this appeal. As regards costs below, it is true as stated by Mr. Jayadeva Mr. Choe has won his case that he pay the money into court and I therefore agree that the applicant should pay costs in the court below also.

Wan Suleiman F.J. concurred.

Ali F.J.: Mr. Choe Kuan Him at all material times was and is an advocate and solicitor practising in the State of Kedah. In a letter dated March 6, 1974 addressed to the appellant he wrote as follows:

"M/s T. Damodaran s/o P. V. Raman,
No. 4211, Sungei Nyor Road,
Butterworth.

Re: Sale of lands held under Grant Nos: 31020 for Lot 1003, 16830 for Lot 141, 16831 for Lot 142, 16832 for Lot 143, 16833 for Lot 144, all in the Mukim of Sg. Pasir, District of Kuala Muda.

This is to confirm that the sum of Ringgit Three hundred and thirty two thousand seven hundred and ninety two ($332,792) being the balance of the purchase price of the abovesaid lands have been deposited with us and that the said sum will be released to you upon the transfer of the said lands being duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns.

Dated this March 6, 1974."

It was common ground that the appellant, Mr. T. Damodaran after having transferred the lands to the respondent's clients sometime in April 1974 received a cheque for $182,200 which was the nett balance of the purchase price due to him after $150,000 had been deducted by the respondent to pay off the mortgages on the lands. However, for reason or reasons which will become apparent shortly payment on the cheque was stopped by the respondent. There followed an exchange of correspondence between them in the course of which it was pointed out to the respondent that his failure or refusal to pay amounted to a breach of a solicitor's undertaking.

Ultimately in July 1974 the appellant applied by Originating Summons for an order to compel the respondent to pay the sum of $182,200 plus interest at 12% per annum and costs.

The English law on summary enforcement of solicitor's undertakings as stated on page 195 of *Halsbury's* Laws of England, Third Edition, Vol. 36, is as follows:

"266. *Enforcement of undertakings.* Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to the client, or to a third person, or if the undertaking is given to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court."

In *re A Solicitor, Ex parte Hales*[1] it was held thus:

"Where a solicitor in the course of legal proceedings makes a statement to a person even though not his client, that funds have been put into his hands for the purpose of payment to that person upon a certain event happening, and that upon the happening of the event he will pay the money, the personal undertaking of the solicitor is sufficient to enable the court to exercise its summary jurisdiction to compel him to carry out the undertaking on the application of the person to whom it is given, although it is not a personal guarantee in the sense that the solicitor guarantees the payment of the money out of his (the solicitor's) own pocket."

Quite apart from these citations reference has also been made to the Guide by the English Law Society 1974 which makes it abundantly clear that an undertaking by a solicitor stands on a special footing in view of his special position under the law. The utmost reliance is placed on any promise or undertaking which he makes either to members of the public or the court. Failure to honour the promise or undertaking is regarded in law as professional misconduct. Under section 26 of our Advocates and Solicitors Ordinance, 1947 the High Court having power of control over Advocates and Solicitors can order them to be struck off the Roll or suspended from practice for gross misconduct. In my opinion there is no difference between the law in England and here.

In the instant case the learned judge, Syed Agil Barakbah J., has found that the respondent's letter of March 6, 1974 was an undertaking by a solicitor and that the respondent's failure or refusal to pay the appellant the $182,200 was a breach of that undertaking. On that finding the learned judge would have no alternative but to order the respondent to pay in accordance with the undertaking. But he did not so order. He directed the money to be deposited into court for reasons as stated in the following passage of his judgment:

"Although I hold that the respondent is liable for the undertaking and in normal circumstances would order him to pay the purchase money to the applicant as prayed, yet in view of the pending civil action in which the applicant is involved as a defendant on a claim by Vasudevan the plaintiff as legal owner of half undivided share of the said land in dispute and in view of a pending application to institute the purchaser, United Realty Sdn. Berhad, as a co-defendant, I have no alternative but to order the respondent to deposit the sum involved into court forthwith. I do so in the interest of justice and in order to safeguard the interest of the plaintiff should he succeed in his claim."

In this appeal the only question raised by the appellant is whether the learned judge was right in making such an order, the effect of which clearly deprives the appellant of the immediate use of the money.

As for the reasons given by the learned judge I must respectfully say that the civil action between Mr. Vasudevan and the appellant has no relevance whatsoever to the issue in the present proceedings. The issue was whether the respondent as a solicitor was liable for the breach of his undertaking. The undertaking was given on his own initiative.

His reason for giving it was obviously to assure the appellant that on the transfer of the lands being completed he would be paid the balance of the purchase price. It was the logical thing to do as the balance had already been deposited with the respondent.

Such assurance coming from a solicitor, as it were, would leave the appellant in no doubt that it would be honoured once the transfers were completed. But the respondent did not honour his words or undertaking. He tried to put up all sorts of excuses for not doing so. In one breath he brought up the question that the lands are not free from encumbrances in view of a *lis pendens* order obtained by Mr. Vasudevan. In another he said in paragraph 10 of his affidavit affirmed sometime in March 1975 that if the balance of the purchase price was to be paid to the appellant his clients, the purchasers, would stand to lose the money as the appellant is not a person of means. He asked the court to order the amount to be deposited into court. Nothing that was said could have any relevance to the issue before the court which was concerned only with his misconduct and his liability to carry out the undertaking.

Since reference has been made to the *lis pendens* order it is necessary to point out that whatever may be its legal effect it can only arise in proceedings brought by the purchasers to recover the purchase money from the appellant. The argument by counsel for the respondent rested almost entirely on the possibility of such proceedings being brought by the purchasers. Such possibility had arisen merely because of Mr. Vasudevan's action against the appellant.

Since neither the purchasers nor Mr. Vasudevan was before the court I fail to see why the learned judge should be so concerned about their interests.

On the facts and on the law applicable in these proceedings there was nothing to justify the order directing the money to be deposited into court. The fact that the appellant had already been paid $36,976 as deposit and the fact that $150,000 had been used by the respondent to pay off the mortgages on the lands should be sufficient to show that the appellant has every right to be paid the balance of the purchase money even if the respondent had not given the undertaking. The appellant, in my view had not done anything to be deprived of his right.

I would allow this appeal with costs and direct that the amount $182,200 and all other sums of money which may be payable to the appellant be paid out to him forthwith together with interest at 6% per annum from the date of this order to date of payment.

Appeal dismissed.

Solicitors: *Skrine & Co.; Jayadeva & Zahir.*

SAMIN BIN HASSAN v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) August 20, 1976]

[Johore Bahru — Federal Court Civil Appeal No. 14 of 1976]

Tort — Negligence — Vicarious liability — Whether driver of vehicle driving as servant or agent of the Government — Whether act within course of employment.

In this case it had been held in the High Court that the driver of a Telecoms Department Land Rover was negligent and thereby caused injuries to the appellant. The learned trial judge also found that at the material time the driver of the Land Rover was not a servant or agent of the Government. At the trial the driver had stated that he took out the Land Rover for a trial run to test its brakes and that in the course of the trial run he had stopped at his house for lunch and that when the accident occurred he was returning to the depot where the vehicle was normally kept. The learned trial judge found that on the evidence there was no defect which made the trial run necessary and that the driver had not obtained the permission of his supervisor to take the Land Rover out. He found as a fact that the driver had taken out the Land Rover for his own purpose which was clearly to go home for lunch and that in doing so he had no permission and was driving on his own and that he was at the material time not driving as a servant or agent of the Government. The appellant appealed to the Federal Court.

Held, dismissing the appeal: the appellate court could not disturb the finding of the learned trial judge and in view of the law applicable, the employers, the Government, were not liable.

Cases referred to:-

(1) *Hilton* v. *Thomas Burton (Rhodes) Ltd. & Anor.* [1961] 1 W.L.R. 705.
(2) *Rose* v. *Plenty* [1976] 1 All E.R. 97.
(3) *Davidson* v. *M'Robb* [1918] A.C. 304, 327.
(4) *Britt* v. *Galmoye & Nevill* (1928) 44 T.L.R. 294.
(5) *Hewitt* v. *Bonvin & Anor.* [1940] 1 K.B. 188.
(6) *Sanderson* v. *Collins* [1904] 1 K.B. 628.
(7) *Harvey* v. *R.G. O'Dell Ltd.* [1958] 1 All E.R. 657, 665.
(8) *Higbid* v. *R.C. Hannett Ltd.* 49 T.L.R. 104.

FEDERAL COURT.

R. Vallipuram for the appellant.

Lim Beng Choon (Federal Counsel) for the respondent.

Suffian L.P.: The question in this appeal is: was the 1st defendant (a Telecoms. Department mechanic) a servant or agent of the Federal Government the 2nd defendant (respondent before us) at the material time?

On June 30, 1970, the plaintiff (appellant before us) was riding his motor cycle along Jalan Endau, Mersing, in the direction of Endau, Johore, when he was run into and knocked down and injured by a Telecoms. Department Land Rover at the 1¼ milestone. The Land Rover was driven by the 1st defendant.

The plaintiff sued the two defendants for damages, alleging that the 1st defendant was negligent and that the 1st defendant was the servant or agent of the Government.

The learned trial judge found that the 1st defendant was negligent and liable. The learned trial judge said that from a starting position on the grass verge outside his house the 1st defendant had made a sharp U-turn without regard to the traffic coming from behind him and he had therefore constituted such an obstruction as to cause the plaintiff to collide into him and fall. This finding of negligence on the part of the 1st defendant has not been challenged.

What however is challenged is the learned trial judge's finding absolving the Government from liability on the ground that at the material time the 1st defendant was not a servant or agent of the Government.

The learned trial judge found the following facts proved. Earlier on the day of the accident the 1st defendant had taken a party of engineers to another place which was in another direction and they had returned to the depot after completion of the work there. The 1st defendant said that thereafter he took out the Land Rover for a trial run to test its brakes and that in the course of the trial run he had stopped at his house for lunch and that when the accident occurred he was returning to the depot where the vehicle was normally kept and that at this time he was still on duty. This evidence was challenged by his immediate superior officer who denied giving him permission to take the Land Rover out for a trial run.

The log book relating to the use of the vehicle contained an entry "Jalan Seri Lalang, kerana menguji berek". The 1st defendant's superior admitted